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Some Reasons Why the Hamilton Radial Railway Bill Should Pass.

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Some Reasons Why the Hamilton Radial Railway Bill should be Passed.

This Bill was passed by the Senate at the last session of Parliament, and was reported by the Railway Committee of the House of Commons, but a question of jurisdiction and Provincial rights having been raised, it was **talked out** at the end of the session.

The promoters of the Bill argued, firstly, that the powers asked for by the Bill could only be given by the Dominion Parliament, and were beyond the jurisdiction of Provincial Legislatures, and secondly that apart from any consideration of the scope of the Bill, there were very strong grounds for the contention that the Company was already under Dominion jurisdiction, that, in fact, no other view was tenable, and that if any possible question or doubt about jurisdiction existed, it should be set at rest and that the Parliament of Canada alone could remove all doubts.

It is perfectly true as stated and reiterated in the debate of last session that applications were on two occasions made to the Ontario Legislature for Acts extending time for construction and other purposes after 1897, when it is now contended the railway went under Dominion jurisdiction; but this was done without any thought or attention being given to the matter of legislative jurisdiction, and indeed it is only very recently that the question has received the careful and serious consideration which its great importance calls for.

The promoters are advised: That the railway has been solely and exclusively under Dominion jurisdiction since 1897; that Parliament has no power to get rid of that jurisdiction or delegate it to any other authority; and that this Radial Railway **is a railway,** and not a street railway.

No more unfortunate case could have been selected for raising a question of infringement of Provincial jurisdiction. Scores of charters have heretofore been granted by Parliament for railways entirely within, and not running to or

near the limits of Provinces, and not crossing or connecting with Dominion railways, and repeatedly railways chartered by the Provincial Legislatures, which clearly were within the competence of the Legislatures, ha[illegible]come Dominion railways by Parliament's declaration th[illegible]vere for the general advantage of Canada; but this p[illegible]icular case has been selected for special opposition notwithstanding that no Legislature could grant the powers asked, and notwithstanding also that the Company has been advised that by reason of what has happened in its case it has become a Dominion railway.

There are probably very few electric railways which were in the same position as the Radial Railway, which was chartered like any ordinary railway by special Act, and which prior to the Dominion legislation of 1900 had gone under Dominion jurisdiction by force of the provisions of the Railway Act of 1888. The Radial's position is quite exceptional.

The judgment of the late Mr. Justice Street and the opinions of the Hon. A. B. Aylesworth, Minister of Justice, the firms of Blake, Lash & Cassels, and Nesbitt, Gauld & Dickson, and of a former Justice of the Supreme Court of Canada, Wallace Nesbitt, K.C., all unequivocally pronouncing the Radial Railway a Dominion railway, should, the promoters very respectfully submit, be regarded as rather conclusive on the subject of jurisdiction, and the following evidence of their views should effectively remove all suspicion or grounds for suggestion that legal questions or doubts are being raised merely for the purpose of helping the Bill through. To question the views of the Minister of Justice and the several eminent legal authorities who have given these opinions, and to refuse legislation, can only mean a determination to keep this Company in a thoroughly paralyzed and helpless condition. Any Acts regarding it passed by the Provincial Legislature since 1897 are of no force or effect—mere waste paper—and surely no business man can fail to appreciate how disastrous it must be to the Company's interests to be compelled to remain in such a position.

Opinion of Blake, Lash & Cassels.

Toronto, October 12, 1907.

The Honourable J. M. Gibson, K.C.,
Hamilton, Ontario.

Dear Sir:—

RE HAMILTON RADIAL ELECTRIC RAILWAY COMPANY.

We have considered the questions asked in your letters of the 8th and 10th of October, and referred to also in the statement of facts mentioned in your letter, and a copy of which is attached hereto.

The question asked is whether, in our opinion, by virtue of the railway legislation of 1888, the Hamilton Radial Electric Company has become a Dominion Railway, and subject exclusively to the jurisdiction of the Dominion Parliament. It is claimed, as we understand it, by certain persons, that notwithstanding the provisions of the Railway Act of 1888, the Hamilton Radial Electric Railway Company is still under the jurisdiction of the Ontario Legislature.

The Company was incorporated **by Chapter 89 of 56 Victoria**, assented to on the 27th of May, 1893. By **chapter 88, 57 Victoria, 1894,** the previous statute of 1893 was repealed.

The corporate existence of The Hamilton Radial Electric Railway Company depends upon this latter statute of 57 Victoria.

1. We have considered very carefully the various statutes and judgments relating to this question, and we are of the opinion that The Hamilton Radial Electric Railway Company is a **railway,** and not a street railway.

2. That the railway, by virtue of the legislation of 1888, is a Dominion Railway, and exclusively under the jurisdiction of the Dominion Parliament.

3. That the Ontario Legislature would have no jurisdiction to grant legislation in respect of this railway.

4. The mere fact that the motive power for operating the railway is electric, is of no consequence. For instance, you will have noticed that the Intercolonial is beginning to operate part of its syster by means of electricity. The C. P. R. is also about to utilize electric power. The char-

acter of the power for driving the engine cannot, in our opinion, make any difference.

Yours truly,

BLAKE, LASH & CASSELS.

Opinion of Nesbitt, Gauld & Dickson.

Hamilton, Canada, October 22nd, 1907.

Hon. J. M. Gibson, Esq., K.C.,
City.

Dear Sir:—

RE HAMILTON RADIAL ELECTRIC RAILWAY COMPANY.

The Hamilton Radial Electric Railway Company was incorporated by 57 Victoria, 1894, Chapter 88, of the Ontario Legislature, and would be subject to Provincial legislation unless such Company has been removed from the jurisdiction of the Ontario Legislature.

By the Railway Act, being 51 Victoria, 1888, Chapter 29, of the Dominion Parliament, it was enacted that each and every branch line or railway now or hereafter connecting with or crossing the lines of Railway, or any of them mentioned in Section 306 of such Act, was a work for the general advantage of Canada; and by section 307 every such railway and branch line thereafter was subject to the legislative authority of the Parliament of Canada.

On March 3rd, 1897, we understand, the Railway Committee of the Privy Council gave permission to The Hamilton Radial Electric Railway Company to cross the tracks of the Grand Trunk Railway near Burlington, and such crossing was constructed during the year 1897.

The Radial Railway was, however, by the sections of the Railway Act of 1888, which we have referred to, brought within the exception as to the local works and undertakings specified in the British North America Act, section 92, sub-section 10 c. and thereby placed under the **exclusive** legislative authority of Canada by virtue of section 91, sub-section 29.

Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the Local Legislature of Ontario to enact any law which

would derogate from the statutes and rights of prop . . enjoyed and held by the Federal Corporation under its constitution created by the Dominion of Canada.

Yours truly,

NESBITT, GAULD & DICKSON.

Opinion of Wallace Nesbitt, K. C.

Toronto, October 26th, 1907.

The Honourable J. M. Gibson,
Hamilton.

Dear Sir:—

I am asked whether, in my opinion, the Hamilton Radial Electric Railway Company's undertaking is a work within the exclusive legislative authority of the Dominion of Canada under the terms of the British North America Act.

The Company in question was incorporated in 1894 by Statute of the Province of Ontario, 57 Vict. (Ont.) cap. 88.

In 1897, I am informed, the Company's line was carried across the line of the Grand Trunk Railway Company near Burlington, the crossing being a grade crossing, leave for the purpose having been duly obtained from the Railway Committee of the Privy Council.

Under Sections 91 and 92 of the British North America Act, the exclusive legislative authority of the Dominion extends to

"such works as, although wholly situate within the Province, are "before or after their execution declared by the Parliament of "Canada to be for the general advantage of Canada."

By Section 306 of the Dominion Railway Act of 1888, being 51 Vict. (Dom.) cap. 29, which was the Act in force in 1897, it was provided as follows:

"The Intercolonial Railway, the Grand Trunk Railway, the "North Shore Railway, ——— are hereby declared to be works "for the general advantage of Canada, and each and every branch "line or railway now or hereafter connecting with or crossing the "said lines of railway or any of them, is a work for the general "advantage of Canada."

In 1893, by 56 Vict. (Dom.) cap. 27, section 3, it was declared that

"the electric railway for the construction and operation of which
"power was given to the Niagara Falls Park and River Railway
"Company."

by the Ontario Legislature should not be affected by section 306 of the Railway Act of 1888, so long as the said railway was operated by electricity.

In 1900, by 63-4 Vict. (Dom.) cap. 23, section 1, the following section was inserted as section 6a of the Railway Act of 1888:—

"Street railways and tramways, while hereby expressly de-
"clared to be subject to such of the provisions of this Act as are
"referred to in section 4, shall not by reason only of the fact of
"crossing or connecting with one or other of the lines of railway
"mentioned in section 306 be taken or considered to be works for
"the general advantage of Canada, nor to be subject to any other
"of the provisions of this Act."

And it was further provided by sub-section 2 of 63-4 Vict. (Dom.) cap. 23, section 1, that

"the said section 6a shall also apply to all electric railways (as dis-
"tinguished from electric street railways) passing through or over
"the Queen Victoria Niagara Falls Park, etc."

In 1903 the sections above quoted were repealed, and 3 Edw. VII. (Dom.) cap. 58, section 7, sub-section 1, took their place, reading as follows:—

"Every railway, steam or electric stre ilway or tramway,
"the construction or operation of which is uthorized by a Special
"Act passed by the Legislature of any Province, now or hereafter
"connecting with or crossing a railway which, at the time of such
"connection or crossing, is subject to the legislative authority of
"the Parliament of Canada, is hereby declared to be a work for
"the general advantage of Canada in respect only to such connec-
"tion or crossing, or to through traffic thereon or anything ap-
"pertaining thereto, and also to the provisions set forth in this
"Act relating to offences and penalties, navigable waters and crim-
"inal matters, and this act shall apply to that extent only."

In 1906, section 7 of the Act of 1903, above quoted, was repealed and R. S. C. 1906, cap. 37, section 8, was enacted, reading as follows:—

"Every railway, steam or electric street railway or tramway,
"the construction or operation of which is authorized by Special
"Act of the Legislature of any Province, and which connects with
"or crosses, or may hereafter connect with or cross any railway
"within the legislative authority of the Parliament of Canada, shall,
"although not declared by Parliament to be a work for the general
"advantage of Canada, be subject to the provisions of this Act
"relating to—

"(a) The connection or crossing of one railway or tramway "with or by another, so far as concerns the aforesaid connection "or crossing;

"(b) The through traffic upon a railway or tramway and all "matters appertaining thereto;

"(c) Criminal matters, including offences and penalties, and

"(d) Navigable waters."

The question upon which my opinion is asked then resolves itself into this: Has the undertaking of your Company ever been declared by the Dominion Parliament to be for the general advantage of Canada, within the meaning of the British North America Act; and, if so, has any subsequent action by the Dominion Parliament had the effect of nullifying or modifying the effect of such declaration?

First, as to the original declaration. At the date when your crossing was made, namely, 1897, the law on the subject was as set forth in the section above quoted from the Dominion Railway Act of 1888. The declaration was absolute in the case of every "railway" crossing the Grand Trunk Railway. The only point, therefore, to be considered in this connection is whether or not the term "railway" in that section covered the undertaking of your Company.

Taken in its literal meaning, it undoubtedly did so; and such other indications as we have of the intention of the Legislature lead us to the same conclusion. In 1893, as we have seen, the Dominion Parliament expressly excepted a certain electric railway from the operation of the section of 1888. And in 1900 it also expressly excepted from the operation of the section all street railways and tramways and certain electric railways. This furnishes the clearest indication that the section of 1888 was understood and intended by the Dominion Parliament as covering electric and even street railways as well as steam railways, and is in fact a legislative exposition to that effect. In my opinion, therefore, the section covered the undertaking of your Company; and that undertaking was consequently, in 1897, duly declared by the Dominion Parliament to be for the general advantage of Canada.

This was, in fact, the decision of Mr. Justice Street in

GRAND TRUNK v. HAMILTON, 29 O. R., 143,

where this very railway and this very crossing were in question.

Then has any subsequent action by the Dominion Parliament had the effect of nullifying or modifying the effect of the declaration so made?

I may in the first place point out that it may be strongly argued that legislation by the Dominion Parliament in 1903 and 1906, set forth above, does not in reality purport to nullify past declarations, but merely to state the conditions upon which future declarations shall arise.

But apart from this, **the point is quite clear to my mind that once the declaration is made the Dominion Parliament has no power, even by the most express legislation, to unmake it.** The British North America Act contemplates a declaration made once and for all. The language of section 92, sub-section 10c of that Act is "such works as——— are before or after their execution declared."

The words, "before or after their execution" point to a specific act of declaration; and there is no provision in the statute for its withdrawal.

That the declaration must be specific and formal was the opinion of Sir Matthew Crooks Cameron in—

Grand Junction v. Peterborough, 45 U. C. R. 302, at 316, and of Mr. Justice Burton and Mr. Justice Patterson in the same case in appeal, 6 A. R. 339, at 341 and 349.

Such also was the decision of the Supreme Court of Nova Scotia in

Windsor v. Western, 3 Russell and Chesley, 376.

Reference may also be had to the judgment in

Hewson v. Ontario, 36 S. C. R. 596, at 605.

The result then is, in my opinion, that the undertaking of your Company is to-day, as it has been since 1897, a matter with regard to which the Dominion Parliament has exclusive legislative authority. And by this it is to be understood, under the decisions in

Toronto v. Bell Telephone Company (1905), A.C. 52.

Madden v. Nelson (1899), A. C. 626, and Attorney-General v. Attorney-General (1898), A. C. 700, at 715, that the Provincial Legislature is competent neither to legislate with regard to the undertaking, nor in any way to interfere with its operations when duly authorized by the Dominion Parliament.

Yours very truly,

WALLACE NESBITT.

The Views of the Minister of Justice.

(See Hansard, 22nd April, 1907.)

Mr. AYLESWORTH. The Bill before the House is one in which, unless it may be the interest which the hon. member for Centre York (Mr. Campbell) has indicated, I have no personal interest, and in regard to which personally and so far as my constituents are concerned, I cannot see that I or they have any special concern. But the hon. gentleman from East Hastings, (Mr. Northrop) has addressed himself to the question whether or not the declaration contained in the first clause of the proposed Bill should be passed by this House and whether or not any reason could be given for passing it. This leads me to point out what possibly has been for the moment lost sight of, namely, the circumstances with regard to legislation of this sort in the case of a company whose works are in the position that the works of this company are in.

The design of the British North America Act was, of course, **that there should be exclusive legislative jurisdiction residing either in this Parliament or in the Provincial Legislature with reference to different subjects matter,** and accordingly section 92, providing the exclusive powers of Provincial Legislatures, declares that in each Province the Legislature may exclusively make laws in relation among other things to,

> Local works and undertakings other than such as are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada.

Now any work which has been at any time **declared to be for the general advantage of Canada is thenceforward to be subject not to the legislative authority of the Provinces, but to the exclusive legislative authority of the Dominion Parliament,** and if, in fact, the works of this company are declared to be for the general advantage of Canada, **then from the time of that declaration no Provincial Legislature has power to legislate with regard to this Company, but this Parliament and this Parliament alone,** and if these works are already in that position or are in a doubtful position the question, I take it, for decision now is **whether or not that doubt should be cleared up,** whether or not this Parliament should speak, **because it is only this Parliament which has the power to declare whether or not any certain works in the country are to be considered to be for the general advantage of Canada.** This company was, as

hon. gentlemen have stated, incorporated in 1894, and after certain amendments in its Act of incorporation there came a time, I am not able to say exactly at what date, when it built its crossing over the line of the Grand Trunk Railway at Burlington. The effect of that action on the part of the company came to be considered before the High Court of Ontario not long afterwards, and Mr. Justice Street, who, I need not say to any one who knew him or to any one acquainted with the jurisprudence of the Province of Ontario, was perhaps the most careful and painstaking judge who ever sat upon the Canadian bench, delivering a carefully considered judgment, to which allusion has already been made, pronounced, I think in 1898 or 1899, the law with regard to this particular company, and said in so many words that the effect of the building of the crossing over the line or across the line of the Grand Trunk at Burlington, was, under the Dominion law as it then stood, to make the works of this Hamilton Radial Railway Company, works thenceforward for the general advantage of Canada, and thenceforward subject only to Dominion legislation. These are his words:

> The defendants (The Hamilton Radial Railway Company) are incorporated by 57 Victoria, chapter 88, Ontario, to construct a line of railway crossing the plaintiff's (Grand Trunk line) at Burlington, but are forbidden by section 19 to cross or intersect the line of any railway operated by steam at grade. Proposing, however, as they do, to cross the plaintiff's line, **they are brought within the legislative authority of the parliament of Canada by sections 306 and 307** of the Dominion Railway Act of 1888, **and by section 4 of the same Act the provisions with regard to crossings are made specially applicable to them.**

That, then, was a judicial declaration of the position of this company some four or five years after it was incorporated, and we have the High Court of Ontario then saying, by the voice of Mr. Justice Street in the language I have read, that this particular company possessed works which were subject only to the legislative jurisdiction of the Parliament of Canada, and not subject to the legislative jurisdiction of the Legislature of Ontario. **The foundation upon which that decision rested was, of course, perfectly plain.** At that time, and for ten years previously, this Parliament had declared by its legislation of **1888** that the works of any railway company, which crossed a Dominion road, by that circumstance became works subject to the legislative jurisdiction of this Parliament. Section 306 of the Railway Act of 1888 in terms enacts that certain named roads are works for the general advantage of Canada:

And each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway or any of them, is a work for the general advantage of Canada.

I am not concerned in the slightest degree with the policy of the legislation. It was the law for nearly twenty years, and the Government of that day no doubt considered that it was in the interest of the country to pass it. **At all events, it was undoubtedly the law of Canada from 1889 forward to 1903, that any railway which crossed a railway which was a Dominion railway, thereby itself became a Dominion railway also.** So we have this situation, that this particular railway, this particular electric road incorporated by the Ontario Legislature in 1894 may have been, and no doubt was, subject to provincial jurisdiction at that time and thenceforward until its line crossed the Grand Trunk, and as soon as its line crossed the Grand Trunk the Parliament of Canada by its declaration of 1888 **declared thenceforward that this crossing road, however little it may be, is a road over which the Dominion Parliament, and the Dominion Parliament ONLY, has legislative jurisdiction.**

Mr. W. F. MACLEAN. Might I ask the hon. gentleman a question? When he makes that rule so broad, does he say that if any portion of the Street Railway of Toronto crosses the Grand Trunk Railway or the Canadian Pacific Railway, it then becomes a work under the jurisdiction of the Dominion of Canada?

Mr. AYLESWORTH. I am only speaking of the law as I find it, **and the law as it stood when Mr. Justice Street pronounced this decision in 1898, I venture to say, is undoubtedly as he declared it.** I am not expressing my own opinion; I am taking his opinion, which is a great deal better, and his opinion is expressed in the most unequivocal and unmistakable language.

Mr. FOSTER. Is it contended that that , the moment it crosses a Dominion railway, becomes subject to Dominion legislation by virtue of legislation passed by this Dominion in the Railway Act?

Mr. AYLESWORTH. The Railway Act of 1888; quite so.

Mr. W. F. MACLEAN. Then, from the argument of the Minister of Justice I take it that if the street railway in Toronto, or any other city, crosses the Grand Trunk or the Canadian Pacific Railway, that street railway comes under the Dominion law.

Mr. AYLESWORTH. I am speaking, as I have said,

of the position of this road, and I am resting myself absolutely in this matter upon the language of Mr. Justice Street. I am not pronouncing any opinion of my own, but I am desirous of pointing out to the committee what the position of this road, and any other that is in the same condition, would appear to be. **From 1888 until 1903 we had in force in this country the unequivocal declaration of the Railway Act of 1888,** that any road which crossed a Dominion road thereby itself became a Dominion road, subject to **Dominion legislation,** and **Dominion legislation only.**

Mr. FOSTER. Is that the law?

Mr. AYLESWORTH. No, that is what I am going to point out. This road was declared to be in that position by Mr. Justice Street in 1898 or 1899, and in 1903 this Parliament passed the present Railway Act in which it uses this language:

> That every railway, steam or electric street railway, or tramway, now crossing a railway which is subject to the legislative authority of the Parliament of Canada, is hereby declared to be a work for the general advantage of Canada, in respect only to such connection or crossing, or to through traffic thereon.

Mr. FOSTER. Hear, hear.

Mr. AYLESWORTH. That was a change of policy on the part of this Parliament which, after fifteen years' experience, was pronounced in 1903. Now, the contention arises at once, and I should think it is a question of very considerable importance for any railway solicitor or counsel to consider: **Can a road which has been for ten years, or for one year, subject only to the jurisdiction of the Dominion Parliament, be referred to the jurisdiction of the Local Legislature so far as legislation over it is concerned. There is no provision of that nature in the British North America Act.** The only provision whatever on the subject in our constitution is the provision of section 92:

> That such works as have at any time been declared to be for the general advantage of Canada **shall thenceforward be subject to the Dominion control only.**

There is no power conferred by any express language or by any implication, that I am aware of, upon the Dominion Parliament to denude itself of its legislative jurisdiction over the works of any undertaking which it once has established.

Mr. FOSTER. Does the decision of the judge on a point of law make that declaration permanent?

Mr. AYLESWORTH. **It is only a declaration of what the law is.**

Mr. W. F. MACLEAN. It is the judge's opinion of what the law is.

Mr. AYLESWORTH. It is a **declaration by the court of what the law was at that time.** Of course Parliament has the power to amend or alter the law, and often a judicial declaration of what the law is is the very ground for the amendment which Parliament in its wisdom makes in that regard. The point I am trying to make clear with regard to the situation of this company is simply this: That from the time its line crossed the Grand Trunk till 1903 it was undoubtedly a road subject only to Dominion legislation.

Mr. A. C. MACDONELL. If that be so, and if this company understood its rights—the judgment the hon. gentleman speaks of was in 1897—why was it that in 1900 and 1904 it went to the Ontario Legislature for amendments to its Act?

Mr AYLESWORTH. My hon. friend will have to ask somebody else than me for an answer to his question; I am not in the confidence of the company; I do not know anything about the company. I have no idea why they did it; that is their affair. I am not concerned with this legislation one way or the other. The hon. member for East Hastings has asked an answer to the question, why is this declaration in section 2 of the present Act at all necessary? I am trying to point out why **it would seem to me to be very necessary in the position in which the law is since the passage of the Dominion Act of 1903.** I am saying that from the time the lines of this railroad crossed the Grand Trunk tracks until 1903 there was no question, upon the decision of Mr. Justice Street and upon the plain language of the Dominion Act of 1888, that this road was subject to Dominion legislative control and no other.

Mr. R. L. BORDEN. In that connection, might I ask the Minister of Justice has he considered the question as to whether or not the provision in the Act of 1888 would necessarily extend to street railways, which are expressly exempted by the Act of 1903? Might it not be possible that that provision would be confined to railways of the character dealt with generally by the Act?

Mr. AYLESWORTH. The language of the Act of 1888 is wide enough to include a railway such as this, which I understand to be scarcely what would ordinarily be con-

sidered a street railway. It is an electric road which, for a considerable part at all events, travels over its own purchased right of way, and does not travel exclusively on the highways. But in that regard I rest, as I think the temptation of any lawyer would be too strong to resist, upon the express language of the court, a competent court, and in this instance one to whose opinion every one would pay the highest respect, declaring that in 1897, at all events, this particular company was subject to the control and legislative jurisdiction of this Parliament.

Mr. R. L. BORDEN. Would the Minister of Justice pardon me one more question? I have not done more than glance at the judgment of Mr. Justice Street, to which he alludes. Does the definitive pronouncement of Mr. Justice Street extend beyond this, that in respect of the crossing of the Hamilton Radial Railway over the Grand Trunk Railway, the first mentioned company was within the legislative competence of the Parliament of Canada, and within the jurisdiction of the Railway Committee of the Privy Council? Apart from what he says, does his judgment extend beyond that point?

Mr. AYLESWORTH. I have not the volume before me, and I am not able at the moment to say what the nature of the action was. I was under the impression that it was a claim for an injunction to restrain this road from doing what it sought; but the language of the learned judge is very definite, and in no way limits the matter to the crossing.

Mr. R. L. BORDEN. What the Minister of Justice read did undoubtedly go that far.

Mr. AYLESWORTH. **I might say that the legislation limiting it to the crossing had not had birth at that time.** That was enacted in **1903**, and it is entirely anomalous. Far be it from me to raise the slightest question as to the validity of any Act passed by this Parliament; but I cannot help noticing that what the British North America Act authorizes this Parliament to do is to declare certain works to be for the general advantage of Canada, and under that language we have a declaration, not that the works generally of the company are for the advantage of Canada, but some defined portion of those works alone. However that may be, we have now this position of affairs so far as the present company is concerned: A company incorporated by provincial statute afterwards becoming, in the execution of the works contemplated by the Act which

brought it into being, subject to Dominion legislative control and to Dominion legislative control alone, continuing in that position for a period of seven or eight years, and then being possibly dethroned, if I may use the expression, by the passing of the Dominion Act in 1908, which limited the Dominion legislative control to crossings. **It is doubtful whether that enactment of 1903 was or was not effective to destroy the Dominion control which had previously existed over the whole undertaking.** This company, being advised by their counsel to seek for an authoritative declaration as to their status and position, it is only this Parliament which can pronounce such an authoritative declaration. **No other tribunal or body can.** This parliament is the one which, by the British North America Act, is alone vested with the jurisdiction to declare a particular work to be for the general advantage of Canada. **Can it ever undo what it has so declared? I find no warrant for it in the British North America Act.** The imperial Parliament has said to this Parliament: You may, in the exercise of your good judgment, declare any work which you, as a Parliament, consider to be for the general advantage of Canada to be of such character; and so declaring, **you, and you only, shall thenceforth have legislative jurisdiction over it. This Parliament did once so declare with regard to this road.** Afterwards something has occurred which puts the position of that road in this respect in doubt. Under these circumstances, it seems to me the most natural thing in the world **that this company should seek to have a declaration on the subject which would put its position beyond question.** As to the general merits of the Bill I say nothing. I am free to admit that I have formed no particular opinion upon it. If, however, we credit those who are asking this legislation with sincerity, then certainly the provisions of this Bill are such as no other Parliament than that of this Dominion can pass.

Correspondence With Provincial Government.

During the debate last session the Hon. Mr. Foster remarked: "We would have been saved a good deal of this trouble if the Company had sat down and reasoned out the path they chose to take before coming to us." **That is precisely the course which was pursued.** Mr. Gibson, by

appointment, sat down with Premier Whitney and his colleagues and explained to them the reasons for the application to the Dominion Parliament for legislation, and went over the legal argument, which was not combatted by them in any way. He also sent the two following letters of 9th and 22nd March, as well as the memorandum referred to in the latter. **Neither of these letters were ever replied to.**

9th March, 1907.

Hon. J. P. Whitney, K. C.,
Premier of Ontario,
Toronto.

My Dear Premier:—

I was sorry that owing to stoppages of the train yesterday on its way to Toronto, aggregating at least an hour and a half, my appearance before you was delayed to so near the time of your going into the House, and that the discussion of the matter in which I am interested was perhaps not as satisfactory as it otherwise might have been. Leaving aside at the present time your Bill No. 118, which I cannot believe has assumed the form in which you would take the responsibility of putting it through, and as to which possibly I might desire to have something further to say to you later on, even though it does not affect any of the companies in which I am interested by a retrospective operation, I desire to urge upon you that in connection with the opposition of the Province to the granting of railway charters at Ottawa this session, whoever represents the Province before the Railway Committee at Ottawa may be instructed to confine opposition to cases on the face of which the Province has jurisdiction. Certainly the Province has no jurisdiction to grant the application of the Hamilton Radial Railway Company, and at the same time, we ought to, in all reason, get what we are asking for. We have in view a railway quite equal to the ordinary trunk steam line railways, and we have in view the crossing of the boundaries, and we have in view connection and interchange of freight traffic with other Dominion railways and we (that is those who own the Radial) own the Brantford and Hamilton Electric Railway, which has a Dominion charter; and **refusing legislation which we are asking at Ottawa would simply mean blocking our enterprise.** Surely, surely, there are enough of short line railways of a suburban character and railways running along the public highways of the country or from one town to another which keep going to Ottawa for their legislation for the Ontario Government to petition against being legislated for by the Dominion, and surely also the Ontario Government do not want to oppose our getting at Ottawa a bill which we could not get at Toronto.

I repeat what I said yesterday, that so far from our wanting to escape supervision or control by the Provincial Board, we would rather have to deal with that Board than the Dominion Railway Board, both on the ground of convenience and because we have been strongly impressed with the view that Mr. Leitch and his colleagues are honestly endeavoring to deal with cases that come

before them with fairness and firmness, uninfluenced either by public clamor or yellow journalism.

I do not think, indeed I know full well, that personally I can look to your Government for as much consideration in business matters like this, as if I were one of your ardent political supporters; and all that I ask is, that your counsel at Ottawa be immediately instructed that in connection with the bill at Ottawa, if it is found the facts are as stated, no opposition be made by him to this particular bill, and if instructions to that effect are to be useful, a letter should be sent to him on Monday.

Believe me,

Yours very tr .y,

J. M. GIBSON.

22nd March, 1907.

Hon. J. P. Whitney,
Premier of Ontario,
Toronto.

My Dear Premier:—

In connection with the application made to the Parliament of Canada for a Bill amending the Act relating to the Hamilton Radial Electric Railway, which was incorporated by Legislature, and for the purpose of declaring that Company "a Company for the general advantage of Canada," I hope that what I said some days ago will be regarded by you and your colleagues as having been seriously intended by me. I want now to state that when giving the matter your consideration, while there might be some doubt, there has been but very little doubt left in my mind that without going to Ottawa at all the Radial Railway has been a Dominion Railway ever since we crossed the Grand Trunk in 1897, and I enclose herewith a copy of a memorandum which I worked out recently, and which to my mind indicates very clearly that it would have been very unsafe for us to have treated the Company as anything less than a Dominion Railway. I think when once the Parliament of Canada declared it with other "railways for the general advantage of Canada" that Parliament could do no more in the way of changing or affecting the question of jurisdiction, for from that moment under the British North America Act, the Parliament of Canada had complete and exclusive jurisdiction which it could not deprive itself of or delegate in any way. In the absence of any legislation at all at the present time, if I had been going to issue bonds or to expropriate right of way, I certainly would have proceeded under the Dominion Railway Act as the safer course to adopt, but you will agree with me that in a matter like this **any possible doubt as to which jurisdiction we are under, should be set at rest,** and I will be very glad indeed if you and your colleagues will take this further explanation from me and dismiss any thought of my desiring to escape Provincial jurisdiction, just for the sake of escaping.

Believe me,

Yours sincerely,

J. M. GIBSON.

Let any one put himself in the position of the promoters of this bill and ask what he would do under the existing circumstances. Candor and honesty would compel an admission that the promoters are adopting the only course open to them.

The Hamilton Radial Railway now runs regularly to Oakville. On Burlington Beach to a considerable extent it runs on the side of the old roadway across that neck of sand. To a great extent in Hamilton, and for almost entirely the remainder of the distance to Oakville, the railway runs on private and expensive right of way, graded for double tracks and double tracked from the centre of Hamilton to the Burlington Canal, with 80-pound rails, the same heavy rails being used all the way to Oakville. Expensive steel bridges on concrete piers have been built at Bronte and Oakville, both providing for double track. There has been expended on the railway in engineering, right of way, construction, equipment, etc., nearly a million dollars. The railway runs into the new Hamilton Terminal station, recently completed at a cost of $250,000, and which is under the same proprietorship. At this station it connects with the Hamilton and Dundas Railway, and the Brantford and Hamilton Electric Railway, the latter of which is nearly completed, the rails having been laid into the City of Brantford. Both of these railways are under the same proprietorship, and the Brantford and Hamilton Electric Railway has a Dominion charter given to it long before the promoters of this Bill had any notion or anticipation of becoming interested in that enterprise. It fills the Hamilton to Brantford purposes of the Radial Railway It is built on the same lines as a first-class steam railway with 80-pound rails, entirely from city to city on expensive right of way and costing over one million dollars.

Connection is also made at the Terminal Station with the Hamilton, Grimsby and Beamsville Railway, running easterly from Hamilton through the fruit district, a distance of 23 miles. The control of this railway belongs also to the proprietary of the Radial Railway. It will not be the policy of the company to closely parallel any of the lines of railway which it owns, and which may be regarded as a part of its system. Entrance into the City of Toronto and terminals there mean very large expenditures of money, which the Company has made provision for. The Company proposes to run along the streets of Toronto only with the consent of and on terms to be agreed upon by the city. Powers to cross the international boundaries at Niagara

and Detroit have been asked for and can only be granted by the Dominion Parliament. The suggestion was made a year ago that when the railway was built to the boundary, if further powers were required they could then be asked for and granted. But that is not the way railway enterprises are financed nor railways built. It would mean a new departure in the case of this railway, and if adopted as a settled practice would render many a useful undertaking impracticable.

This is not a street railway in any sense, and never has been, nor does it do a street railway business. Its original charter was granted before the passing of the Electric Railway Act and definitely puts the Company and its railway under the General Railway Act of Ontario, so that all talk or argument based upon the Railway being assumed to be a street railway—whatever difference that might make—is quite wide of the mark.

The foregoing observations have been made with a view to showing that a case on the merits and facts has been made out—that the Company is inseparably connected up in a railway system part of which is under Dominion jurisdiction, that it is built on lines similar to the large steam railways and will carry on a freight business necessitating interchanges of traffic, and that the extensions it asks for cannot be granted by a Provincial Legislature, but only by the Parliament of Canada.

But apart from all this, when it is shown that by virtue of Dominion legislation the Company, according to the judgment of the late Mr. Justice Street, became a Dominion railway, and that this view is unequivocally expressed by the Honourable the Minister of Justice, and by the legal firms of Blake, Lash & Cassells, and Nesbitt, Gauld & Dickson, and a former Justice of the Supreme Court, Wallace Nesbitt, K.C., surely a sufficient case has been made out for the bill and a declaration that will put an end to all question about jurisdiction and enable the Company to proceed with its undertakings.